Wright v Port Auth. of N.Y. & N.J.
2016 NY Slip Op 31785(U)
September 27, 2016
Supreme Court, New York County
Docket Number: 152742/2013
Judge: Gerald Lebovits

NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

CYNTHIA WRIGHT,

Plaintiff,

-against-

Index No.: 152742/2013
DECISION/ORDER
Motion Sequence No. 2

THE PORT AUTHORITY OF NEW YORK & NEW JERSEY and T.U.C.S. CLEANING SERVICES, INC.,

Defendants.

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendants' motion for summary judgment.

Papers	**Numbered**
Defendants' Amended Notice of Motion	1
Plaintiff's Affirmation in Opposition	2
Defendants' Reply Affirmation	3

Getz & Braverman, P.C., Bronx (Michael Braverman of counsel), for plaintiff.
Harris, King & Fodera, New York (Josefina Belmonte of counsel), for defendants.

Gerald Lebovits, J.

Defendants, the Port Authority of New York & New Jersey (Port Authority) and T.U.C.S. Cleaning Services, Inc. (TUCS), move under CPLR 3212 for summary judgment dismissing plaintiff's complaint based on lack of notice of the alleged dangerous condition.

Underlying Allegations

Plaintiff alleges that on August 28, 2012 at 7:00 p.m. she was walking with her cousin, Kimberly Harris in the Port Authority bus terminal (the Terminal), located at Eighth Avenue between 40th and 42nd Streets in New York County when she slipped and fell on a wet floor (bill of particulars, items 1-3); plaintiff EBT at 10-11, 17; Harris affidavit, ¶¶ 3-4). Plaintiff states that she had arrived in the Terminal shortly before getting tickets; she and Harris went downstairs to the first level, went outside the Terminal to eat. When they returned to the Terminal, they had been walking on the right side of the first level, about half the distance to the ticket booth, and had reached a restaurant (the Restaurant) plaintiff thought was named "Armada" (plaintiff EBT at 20-24).

Plaintiff contends that she slipped and fell on a puddle right outside the Restaurant resulting in injuries, including a rotator cuff tear to her left shoulder, severe injuries to her lumbar disks, and injuries to her left knee (id. at 25, 33-35, 49, 58-59, 63, 69-70). She states that

the puddle was circular, approximately two feet wide and had numerous footprints in it (id. at 33, 38, 40-41, 44; Harris affidavit, ¶¶ 4, 6-7).

The Port Authority owns the Terminal and it contracted with TUCS for cleaning and maintenance of the facility (Brown EBT at 8-9). TUCS contends that it had a cleaner, Hunt, located on the first floor of the Terminal, whose responsibility it was to go continually up and down the first floor of the Terminal, cleaning any debris or spills (id. at 18-21, 24-25, 35-36; Hunt EBT at 8-9, 11, 21-22). It further states that the cleaning supervisor, Brown, also went around the Terminal to supervise the cleaners and ensure the cleanliness of the Terminal (Brown EBT at 26-27).

Defendants assert that, on August 28, 2012, between 7:30 p.m. and 8:00 p.m., Brown heard plaintiff reporting her accident, that he summoned Hunt, that they went to the only restaurant on the right side of the Terminal's first floor, Au Bon Pain, and there was no water or other liquid on the floor outside the Restaurant (id. at 30-33, 39, 41-42; Hunt EBT at 14-15, 17, 20). TUCS also states that there were no prior incidents of spills that evening (id. at 23; Brown affidavit, ¶¶ 5-6).

Additionally, Brown states that he had walked in the area outside the Restaurant on August 28, 2012, between 7:30 and 7:35 p.m.— which he estimates was 10-15 minutes before he heard plaintiff reporting her accident — and at that time, the floor was dry and clean (id., ¶¶ 2-4). Hunt states that on August 28, 2012, before his 7:00 lunch — at about 6:45 p.m. — he checked the area outside the Restaurant and the floor was clean and dry (Hunt affidavit, ¶ 6). Finally, defendants note that, in her deposition, plaintiff stated that when she went outside the Terminal with Harris to eat, 15 or 20 minutes before her accident, the floor outside the Restaurant was not wet (plaintiff EBT at 20, 107).

Summary Judgment Standard

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (id.). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt that material issues of fact exist (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]; *Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]). A court should deny a summary-judgment motion "[w]here different conclusions can reasonably be drawn from the evidence." (*Sommer v Fed. Signal Corp.*, 79 NY2d 540, 555 [1992]).

Premises Liability

Generally, a landowner must act as a reasonably prudent person in maintaining its property in a reasonably safe condition under all the circumstances, including the likelihood of injury, the potential seriousness of injury and the burden of avoiding the risk (*Peralta v Henriquez*, 100 NY2d 139, 144 [2003]). Also, in order to be held liable, a party must be aware of the alleged defective or dangerous condition, either through having created it, actual knowledge of the condition or constructive notice of it through the defect's visibility for a sufficient amount of time before the accident to allow a defendant to discover and remedy it (*Gordon v Am. Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Moreover, "[a] defendant moving for summary judgment in a slip-and-fall action has the initial burden of showing that it neither created, nor had actual or constructive notice of the dangerous condition that caused plaintiff's injury" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]; *Amendola v City of New York*, 89 AD3d 775, 775 [2d Dept 2011]; *Schiano v Mijul, Inc.*, 79 AD3d 726, 726 [2d Dept 2010]). A defendant's showing is "insufficient to establish a lack of constructive notice as a matter of law [where the defendant] did not state how often he inspected the floor [where plaintiff slipped and fell] or that he or defendant's employees inspected the accident location prior to the accident" (*Jahn v SH Entertainment, LLC*, 117 AD3d 473, 473 [1st Dept 2014]; *accord Quintana v TCR. Tennis Club of Riverdale, Inc.*, 118 AD3d 455, 456 [1st Dept 2014]). Testimony that defendant inspected "the area where plaintiff fell, within the hour preceding plaintiff's accident, and no wet or dangerous condition" existed constitutes prima facie evidence of lack of constructive notice (*Gomez v J.C. Penny Corp.*, 113 AD3d 571, 572 [1st Dept 2014]; *Green v Gracie Muse Rest. Corp.*, 105 AD3d 578, 578 [1st Dept 2013]).

Discussion

Initially, defendants argue that this court not consider Harris's affidavit on this summary-judgment motion, contending that defendants lacked an opportunity to depose her. However, plaintiff identified Harris as a witness in her examination before trial (EBT) and defendants never moved to preclude Harris's testimony or to compel her EBT. Harris's testimony supports plaintiff's version of the accident and, while she has a familial relationship with plaintiff, this does not bar this court from considering her affidavit.

Defendants have presented evidence, through the affidavits of Brown and Hunt, that the area outside the Restaurant was inspected shortly before plaintiff slipped and fell and there was "no wet or dangerous condition" and that when Brown and Hunt went to the accident site, no puddle of water existed (*Gomez*, 117 AD3d at 572). Plaintiff and Harris state that there was a round puddle of water outside the Restaurant, with numerous footprints and that plaintiff slipped in this puddle. For the purpose of deciding the motion, the court must accept plaintiff's version of controverted facts as true. Therefore, the court must accept that after the accident, there was a puddle of water outside the Restaurant. Plaintiff has inferred that, because there were several footprints in the puddle, it must have existed long enough to provide constructive notice to defendants. This is mere speculation and plaintiff has not contested the evidence that Brown and Hunt inspected the area shortly before plaintiff's accident and found it clean and dry. Also,

plaintiff passed the area about 20 minutes before she fell and found it to be dry (plaintiff EBT at 20, 107). Consequently, defendants have shown that they lacked knowledge of the alleged wet condition of the floor for a sufficient period of time to enable them to discover it and correct the condition (Gordon, 67 NY2d at 837; Gomez, 113 AD3d at 572; Green, 105 AD3d at 578). Defendants' motion for summary judgment dismissing plaintiff's complaint based on lack of notice is granted.

Accordingly, it is hereby

ORDERED that the Port Authority of New York & New Jersey and T.U.C.S. Cleaning Services., Inc.'s motion for summary judgment is granted, the complaint is dismissed, together with costs and disbursements, as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that defendants serve a copy of this decision and order on plaintiff with notice of entry and on the County Clerk's Office, which is directed to enter judgment accordingly.

Dated: September 27, 2016

J.S.C.

HON. GERALD LEBOVITS
J.S.C.